AMMB FACTORS SDN BHD

v.

POH TING KUWI

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D5-22-1983-1998]
13 OCTOBER 2000

CIVIL PROCEDURE: *Affidavits - Filing and service - Affidavits in reply - Rules of the High Court 1980, O. 32 r. 13(2)(b) - Whether 14-day time period applies only to first affidavit in reply or to all such affidavits*

The sole issue in the instant appeal was whether the 14-day period to reply to an affidavit, as prescribed by O. 32 r. 13(2)(b) of the Rules of the High Court 1980, ('RHC') applies only to the first affidavit in reply to a summons-in-chambers or to all other subsequent affidavits that a party may wish to file in the proceedings.

Held:

[1] Order 32 r. 13(2)(b) RHC is clear and unambiguous. The rule provides for a party wishing to reply to an "affidavit", that is to say, any affidavit to be used in the summons-in-chambers. Thus, the sub-rule applies to all affidavits which the deponent intends to reply to.

[2] Even assuming that O. 32 r. 13(2)(b) RHC is ambiguous, on the same principle accorded to Acts of Parliament by s. 17A of the Interpretation Acts 1948 and 1947, the ambiguity must be resolved by adopting a construction that will promote the purpose for which the sub-rule was formulated. The purpose for which O. 32 r. 13(2) was framed was to alleviate the filing and serving of an affidavit by a party at the eleventh hour, an act which would invariably cause the proceedings before the judge to be postponed merely to allow counsel for the other party to read and prepare, if necessary, any further affidavit in reply. Therefore, a purposive interpretation requires a ruling that the 14-day rule applies to all affidavits which a party intends to reply to, be it an affidavit in reply or any subsequent affidavits in the proceedings.

[Order accordingly.]

Case(s) referred to:
Kesultanan Pahang v. Sathask Realty Sdn Bhd [1997] 2 CLJ 723 ***(refd)***
Majlis Daerah Dungun v. Tenaga Nasional Bhd [1999] 8 CLJ 337 ***(not foll)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(refd)***
Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia [2000] 3 CLJ 659 ***(refd)***

Legislation referred to:
Interpretation Acts 1947 & 1948, s. 17A
Rules of the High Court 1980, O. 32 r. 13(1), (2)(b)

For the plaintiff - Kingston Tan (Shereendar Kaur with him); M/s Heiley Hassan, Tan & Partners
For the defendant - CL Wong; M/s Wong Law & Assoc

Reported by S Dharmendran

JUDGMENT

Kang Hwee Gee J:

The plaintiff AMMB Factors Sdn Bhd's appeal in this case involves the pusine issue of whether O. 32 r. 13(2)(b) of the Rules of the High Court 1980 applies only to the first affidavit in reply to a summons-in-chambers or to all other subsequent affidavits in which a party may wish to file in the proceedings.

The question arose before the senior assistant registrar before whom the plaintiff's counsel Mr. Kington Tan appeared to oppose the defendant's application to set aside the judgment in default of appearance entered against the defendant. At the hearing counsel for defendant raised a preliminary objection to the admission of two affidavits which the plaintiff had filed as replied to the defendant's affdavits in reply on the ground that they were filed and served on the defendant later than 14 days contrary to r. 13(2)(b).

The preliminary objection was allowed and consequently the senior assistant disregarded the two affidavits of the plaintiff which were filed after the 14 days period. Hence this appeal.

Rule 13 reads as follows:

> (1) Any party –
>
> (a) filing an affidavit intended to be used by him in any proceedings in chambers; or
>
> (b) intended to use in any such proceedings any affidavit filed by him in previous proceedings,

must give notice to every other party of the filing or, as the case may be, of his intention to do so.

(2) Save as otherwise provided in these rules –

(a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

(b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

Mr. Kingston Tan maintained that the senior assistant registrar was wrong in interpreting that the 14 days rule applies to all affidavits in reply for there is now a direct authority of the High Court in the case of *Majlis Daerah Dungun v. Tenaga Nasional Bhd* [1999] 8 CLJ 337, which had decided otherwise.

Page 340E of the judgment read:

> It is evident that by virtue of the phrase 'Save as otherwise provided in these rules' appearing in sub-r. (2), the application of the subrule does not apply to any provisions to the contrary, in particular to the procedure in sub-r. (1) of r. 13. Subrule (2) applies only to an affidavit in support of an application in chambers and to an affidavit in reply to the affidavit in support of such application but not to subsequent affidavit, otherwise the subrule would have provided so.

And at p. 340G:

> However, to my mind, the purpose of the enactment can still be maintained because the procedure laid down in sub-r. (1) appears to be expeditious and supplementary to the purpose of sub-r. (2). That is the only construction that can be given to sub-r. (2) in order to harmonise sub-rr. (1) and (2). Any other construction would result in the non-application of sub-r. (1) under any circumstances and would lead to absurdity.

It would appear that the ratio for the ruling that the 14 days rule should apply only to "the affidavit in reply to the affidavit in support of an application in chambers, but not to subsequent affidavit" is based on the premise:

(i) that r. 13(2) does not expressly provide that it was intended to apply to other subsequent affidavits filed by the parties and,

(ii) that r. 13(2) had to be harmonised with the preceeding r. 13(1) and that any other interpretation would result in absurdity.

The decision appears sound enough if only because r. 13(2) does not expressly say that it it was meant to apply to all affidavits intended to be used in the summons. But having scrutinised O. 32 r. 13 in the process of hearing similar arguments in the past and made rulings to the contrary, I must with respect say that I do not share the same sentiment expressed in that judgment, for the following reasons:

1. Rule 13(2)(b) is clear and unambigious. The rule provides for a party wishing to reply to "affidavit", that is to say, any affidavit to be used in the summon in chambers. The language is clear. The subrule applies to all affidavits, whether an immediate affidavit in reply or any subsequent affidavits which the deponent intends to reply to.

   Rule 13(2)(b) could not have been any clearer by its use of the words "wishing to reply to an affidavit" to express the intention of the Rules Committee that it is meant to apply not only to the affidavit in reply but also to any subsequent affidavits which an opponent may have served on the party wishing to reply. No further qualifying expression is therefore neccessary.

2. Rule 13(1) is concerned with the giving of "notice to every other party" of the intention of a party to use an affidavit filed by him in the proceedings in chambers. Rule 13(2) on the other hand is concerned with the imposition of a time limit on the filing and service of the affidavit to be used in such proceedings in chambers. The two subrules therefore are meant to serve different functions. Save that the effect of both the subrules serve to alert the other party of the impending use of the affidavit being filed, there is no nexus between r. 13(1) and r. 13(2) as to require that they be harmonised to give effect to the purport of r. 13 as a whole.

3. The purport of r. 13(2)(b) is by its language so plain that it is hardly neccessary in my view to embark on the task of interpretation – *absoluta sententia expositore non indiget* (It is not allowable to interpret what has no need of interpretation.)

But even assuming that r. 13(2)(b) is ambiguous – that on the face of it the words "a party wishing to reply to an affidavit" in r. 13(2)(b) can also be read to apply only to an affidavit in reply, then the ambiguity must be resolved by adopting a construction that would promote the purpose for which O. 32 r. 13 has been formulated – on the same principle accorded to Acts of Parliament by s. 17A of the Interpretation Act 1948 and 1947 which read as follows:

> 17A. In the interpretation of the provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(See the purposive approach to interpretation being applied in *Syed Mubarak Syed Ahmad v. Majlis Peguam Malaysia* [2000] 3 CLJ 659 and *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1997] 2 CLJ 723).

Few knowledgable practitioners of law who have to make constant reference to the Rules of the High Court 1980 would deny that the purpose for which of r. 13(2) was framed was to alleviate the filing and serving of an affidavit by a party at the eleventh hour, an act which would invariably cause the proceedings before the judge to be postponed merely to allow counsel for the other party to read and prepare if neccessary any further affidavit in reply.

The purpose for which r. 13 is framed was accurately postulated in the judgment of Siti Norma Yaakob JCA in *Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong* [1996] 3 CLJ 321 at p. 329 in the following passage:

> We would like to add that O. 32 r. 13(2) was added by way of an amendment to the RHC for the orderly disposal of applications in chambers and it came into effect on 1 August 1993. It sets out the time frame within which affidavits, intended to be used in proceedings in chambers either in support of or in reply to such applications, are to be filed and served thereby preventing any last minute filing and service of such affidavits which before the amendment would have neccessitated such applications being adjourned repeatedly thereby causing delay.

In fact the same conclusion was reached by His Lordship in *Majlis Daerah Dungun, supra,* when he said at p. 340:

> There is no doubt that the subrule was specifically enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavit at the last minute (see *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 at p. 470H); and that it may be argued that the interpretation that I have given to the subrule may once again give rise to the mischief that the enactment had intended to eradicate.

Having known the objective of r. 13(2) a purposive interpretation therefore requires a ruling that the 14 days rule apply to all affidavits which a party intends to reply to, be it an affidavit in reply or any subsequent affidavits in the proceedings. Any interpretaion to the contrary would be an impediment to the purpose for which the rule was framed. The very purpose of requiring an affidavit in reply to be filed and served within 14 days itself would be rendered nugatory if subsequent affidavits can be filed and served later than 14 days. Surely that could not have been what the Rules Committee had intended.

The appeal on the preliminary objection of the plaintiff is dismissed.